BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS LOCAL 662

and

D.C. EVEREST SCHOOL DISTRICT

Case 50
No. 56318
MA-10237

(Grievance of Jeffrey Hinke)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Mr. Scott D. Soldon** and **Mr. Jonathan M. Conti**, on behalf of the Union.

Ruder, Ware & Michler, by **Mr. Ronald J. Rutlin**, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "District", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Schofield, Wisconsin, on July 14, 1998. There, both parties agreed that I should retain my jurisdiction if the grievance is sustained and they then also agreed to waive the contractually-provided three person arbitration panel. The hearing was transcribed and both parties filed briefs that were received by September 10, 1998. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties have not jointly agreed on the issue, I have framed it as follows:

Whether the District properly terminated grievant Jeffrey Hinke and, if not, what is the appropriate remedy?

BACKGROUND

Grievant Hinke, a full-time Custodian II with seven (7) years seniority, worked on the 3:30 p.m. – 11:30 p.m. shift in the District's high school. There, he often worked alongside fellow custodian Mary L. Waldhart who worked in the high school and who also cleaned the District's administrative offices that are located in a separate building. She, unlike Hinke, had keys to said offices.

On the night of March 9, 1998 (all dates hereinafter refer to 1998), Hinke spoke to Waldhart about the fact that she could enter the District's administrative offices. There is a testimonial conflict over exactly what was said and why it was said.

Waldhart, a part-time employe, testified that Hinke at about 7:00 p.m. – 7:30 p.m. "asked me if I would go into the files in [Supervisor of Personnel James Jaworski's] office, and get some information for him"; that she initially thought Hinke was kidding and replied, "What"; and that he replied, "well, can you go in the office and get me some information in those files". She said she would not do that, and that he said, "well, you know, maybe you wouldn't have to do it. Maybe if I would let him in that he could do it", to which she again said no. Waldhart testified that Hinke then said "Well, I suppose that everything is under lock and key anywhere so I couldn't get in", to which she replied, "It could be", at which point she left.

Asked whether she believed Hinke was serious, she testified: "At first, like I said, I thought he was kidding, but then when he asked – when he paused for a few seconds and asked again if he could go in, or you know, if I would let him in, I thought, well, he must have been serious. That is what I took it as." On cross-examination, she stated that she never felt threatened in her exchange with Hinke; that he never followed her to the administration offices; and that she never again brought up this subject with Hinke during the subsequent time they worked together.

Hinke, by contrast, testified that when he spoke to Waldhart on March 9, "I just made a joke to her. I just said, 'I suppose you get to look through all of our files while you are over there' and then I – I remember both of us laughing. I know I laughed, and then I added, 'I know everything is locked up anyway.'" Hinke denied mentioning keys in their conversation and said, instead, that he told Waldhart: "I am sure all the filing cabinets are locked up anyway." He denied ever asking her to break into any files or letting him do so himself. Hinke said that he had reviewed his own pesonnel file in June, 1997; that he knew he could do so anytime; and that he had no intention of switching any information in his file.

Waldhart became concerned over Hinke's comments and she that night wrote a note to Supervisor of Personnel Jaworski (District Exhibit 1), stating:

Jim,

(Mon. night)

On 3-9-98 Jeff Hinke asked me if I would go into your personal files and get some information for him. I didn't think I heard him right, I said what! He asked me again, and I said no, I wouldn't do that! Then he said well maybe you wouldn't have to do it, you could just let me in, & he would do it, and I told him I would not do that either. He said he wanted to get into the files so he could switch some information around. I thought it was strange & that I should let you know about it. If you have any questions call me. I would prefer that he not know I told you this. Thanks,

. . .

Waldhart met with Jaworski on March 12, along with Custodial Supervisor Lee Jorgensen and School Superintendent Roger Dodd, at which time she recounted her March 9 conversation with Hinke recounted about. Waldhart thereafter gave a statement to the local police on March 13 regarding her encounter with Hinke (District Exhibit 2).

School Superintendent Dodd testified that he decided to investigate the matter after Waldhart spoke to him; that he spoke to Hinke on March 12 in the presence of Union steward Bob Kaszubski and asked him if "he had tried to solicit help from a co-employee to access personnel files in the building"; and that he asked Hinke "why anybody would make up a story like this", to which Hinke replied: "I don't know. People in the District have been out to get me for a long time." Dodd told Hinke, "Jeff, I'm disappointed in your answers. I believe that the person who has brought this allegation is telling the truth. I wish you had come in and said that, yeah, a conversation like that happened, but I didn't intend for her to take it seriously, that it was all a joke." Dodd suspended Hinke with pay and told him not to have any conversation with Waldhart.

On cross-examination, Dodd acknowledged that he did not tell Hinke or his Union representative ahead of time why he wanted to speak to Hinke on March 12; that he on March 12 did not either give or show to Hinke a copy of Waldhart's earlier March 9 statement to Supervisor of Personnel Jaworski (District Exhibit 1); and that he did not mention Waldhart's name until near the end of their meeting.

Hinke testified that during his meeting with Dodd, "I was confronted that there was information that I was conspiring to break into the administration building and get into personnel files." Hinke testified that he then replied, "I didn't make any type of plan or conspiracy, and I didn't know what they were talking about"; that Dodd told him that

Waldhart was the individual who had accused him of trying to solicit her to break into the files; and that he replied he "couldn't understand where such an idea came from." Hinke added that Dodd did not then show him Waldhart's written statement to Supervisor of Personnel Jaworski (District Exhibit 1).

On cross-examination, Hinke acknowledged that he had a good relationship with Waldhart; that he believed her to be a truthful person; and that he has no reason to believe she has lied about their March 9 conversation. He said that Dodd told him on March 12 that he was hoping that he, Hinke, would admit his conversation with Waldhart, but say that he was joking when he spoke to her. Asked whether Dodd then told him he was "putting a co-worker in jeopardy by trying to get her to go into the personnel files of the District", Hinke answered: "He said that, but I still didn't know what he was talking about." Hinke denied ever telling Dodd that someone had lied about him and said that he first told his Union representative after his March 16 termination that he had made a joking comment to Waldhart, but that "it had nothing to do with asking her to aid me in gaining entry." Hinke said that Waldhart laughed when he spoke to her. Hinke added that he filed a complaint with the State of Wisconsin's Equal Rights Division in early March, 1998, wherein he complained that he had been treated differently and more harshly than other employes. (District Exhibit 4).

Dodd and other management personnel decided to terminate Hinke on Monday, March 16. Dodd later that day met with Hinke and then told him of his termination, to which Hinke replied: "I am speechless. It's at best a gross exaggeration", or words to that effect. Dodd then issued Hinke the following termination letter (Joint Exhibit 3):

. . .

DISCHARGE OF JEFF HINKE

Please consider this confirmation of your suspension with pay on Thursday, March 12, 1998. Upon further investigation of your attempt to solicit a co-employee to assist you to unlawfully enter the D.C. Everest Area School District Administration Building and the office of Jim Jaworski, Supervisor of Personnel for the purpose of illegally accessing school district files, you are hereby notified of your discharge from the employment of the D.C. Everest Area School District effective today, March 16, 1998.

This discharge is made in accordance with Article 10 – Discharge of the contractual agreement between the D.C. Everest Board of Education and General Teamsters Local No. 662.

. . .

Dodd and others subsequently met with Hinke on March 18, at which time Hinke produced parts of a written statement he had given to police, (Union Exhibit 2), wherein he claimed that his conversation with Waldhart was a joke. At that point, Jaworski said that Hinke had changed his story and that he had gotten the idea to say it was all a joke from Dodd a few days earlier.

Hinke grieved his discharge on March 18, thereby leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Union argues that the just cause standard is applicable here even though the contract does not expressly contain such a standard; that the District has failed to establish "beyond a reasonable doubt" that it had just cause to terminate Hinke; that Waldhart's accusations against Hinke were based on a "misunderstanding"; and that the District's investigation "was not conducted in a fair and objective manner." As a remedy, the Union asks for Hinke's reinstatement and a traditional backpay order. Alternatively, the Union states that even if "Mr. Hinke was lying when he initially denied any knowledge of the incident, such a denial does not rise to the level of a dischargeable offense for dishonesty."

The District, in turn, contends that it properly terminated Hinke over his dishonesty because "it is undisputed that he lied during the District's investigation"; that the just cause standard is inapplicable because it is not mentioned in the contract; that the "applicable burden of proof is a preponderance of the evidence" and that it has met said burden here; and that Hinke's "conduct is so serious as to merit summary discharge."

DISCUSSION

This case turns on what was said between Hinke and Waldhart on March 9 and whether Hinke was serious when he spoke to her about gaining access to the administration building.

I conclude that Waldhart's testimony should be credited over Hinke's testimony because: (1), Waldhart had no reason to fabricate her testimony against Hinke, a point that even Hinke acknowledged during his testimony; (2), Waldhart's subsequent action in writing her March 9 note to Supervisor of Personnel Jaworski (District Exhibit 1) is consistent with what Waldhart testified to here; (3), Waldhart testified in a highly credible fashion; and (4), Hinke's initial denials to the District regarding his conversation with Waldhart render his testimony incredible.

Hinke on March 12 thus initially denied to Superintendent Dodd that he had any conversation with Waldhart, when in fact, it is clear that he did, a point Hinke ultimately acknowledged in his March 17 statement to the police (District Exhibit 2) and in his subsequent March 18 meeting with Dodd. While Hinke now claims that he was confused about Dodd's March 12 questions regarding Hinke's conversation with Waldhart, the record shows that Hinke, in fact, had to know on March 12 what Dodd was talking about, as Dodd then specifically mentioned Waldhart by name. The fact that Hinke then chose to hide the truth indicates that he did not want the truth to come out.

I therefore also credit Waldhart's testimony that Hinke was serious when he asked for her assistance in gaining access to the District's files. While the Union claims that Hinke had no reason to access those files because he knew he could always see his own personnel file (as he did in the past), it is possible that Hinke wanted to either look at other files that he otherwise could not examine or to look for documents that were related to his recently-filed complaint with the State of Wisconsin's Equal Rights Division that he filed a few days earlier. But, in any event, it is unnecessary to determine what motivated Hinke since the record shows – via Waldhart's credited testimony - that he was serious when he tried to enlist her help in gaining access to the District's files.

His attempt to do so constituted "dishonesty" as that term is used in Article 10 of the contract entitled, "Discharge", that provides:

> **Section 1.** No employee who has completed his/her probationary period shall be discharged or suspended without one (1) warning notice of the complaint in writing to the employee with a copy to the Union and Steward, except no warning notice is required for discharge due to dishonesty, being under the influence of intoxicating beverages while on duty, use of illegal drugs while on duty, immediate possession of intoxicating beverages or controlled substances, carrying unauthorized passengers in an Employer vehicle, recklessness resulting in a chargeable accident while on duty or other flagrant violations. Warning notice to be effective for not more than one hundred eighty (180) days from date of notice. Discharge or suspension shall be in writing with a copy to the Union and the employee affected.
>
> . . .

The District therefore was free to terminate him without any prior notice for engaging in such egregious misconduct. That is true irregardless of whether a just cause standard is used (an issue I need not decide), as termination in any event would still be warranted even under a just cause standard.

The only remaining ground for overturning his discharge would be the Union's claim that the District's investigation was marred by procedural irregularities, i.e., that the District did not tell Hinke or Union steward Kaszubski ahead of time what Dodd wanted to discuss with Hinke on March 12; that Dodd did not then provide Hinke with a copy of Waldhart's written statement to Jaworski; that Dodd did not mention Waldhart's name earlier in their conversation; and that the District by March 16 had already decided to fire Hinke even before he provided additional information at that time and on March 18.

While all of these facts are true, they are insufficient to overcome the two central facts of this case: i.e., that Hinke engaged in egregious misconduct when he asked for Waldhart's help in gaining access to the District's files and that Hinke thereafter chose not to tell the truth when asked about it during the District's subsequent investigation and during the instant arbitration proceeding. Any claimed shortcomings in the District's investigation hence were not prejudicial and thus are insufficient to set aside the District's discharge decision.

The Union cites ASSOCIATED CLEANING CONSULTANTS, 94 LA 1246 (Lubow, 1990), in support of its alternative claim that Hinke should be reinstated even if he lied about his March 9 conversation with Waldhart. In that case, arbitrator Martin Lubow ruled that a grievant who lied about whether he took money from a geriatric patient should be reinstated because, in arbitrator Lubow's words:

. . .

> Lying is a dishonest act. No one could quarrel with that. However, in a preemptory discharge clause, where only "cardinal sins" form the basis for bypassing the progressive discipline system, a lie of denial of an act, which results in punishment, is not the equivalent of intoxication on the job or physical violence.
>
> As one who has long lamented the decline of truthfulness in society generally, I hesitate to contemplate the state of our economy if lack of candor in the workplace became a dischargeable offense. Surely the negotiators did not mean that when they used the word "dishonesty" as a basis for preemptory challenge. I suspect they had theft in mind.
>
> The Company memorandum cites the case of FURRS, INC. AND UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1564, December 12, 1986 [88 LA 175], to support its position that lying *per se* is such an act of dishonesty as to be a basis of preemptory challenge. Arbitrator Albert Blum does indeed hold that position. He does so in the face of clarifying examples, none of which include lying. His only rationale is a Webster's dictionary definition. I

> disagree. If lying on the job were to be the basis of a penalty, I do not believe it would be one of the "cardinal sins." As a matter of fact, I cannot remember one case in 30 years plus in this field where lying in the workplace was made the basis of any penalty, let alone the ultimate penalty as a result of a single offense. Id, at 1248.
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> . . .

The facts here, however, are distinguishable because Hinke was not fired for lying, but rather for trying to enlist Waldhart's help in gaining access to the District's records. No such dishonesty was found in ASSOCIATED CLEANING ASSOCIATES because it turned on whether the grievant there had borrowed money from a patient and because arbitrator Lubow found: "There was no intent not to repay demonstrated to support a charge of fraud." Id, at 1248.

In addition, I in any event, do not agree with arbitrator Lubow's ruling that it is perfectly all right for a grievant to lie in an investigation and to then repeat those lies under oath. Lying under oath in an arbitration proceeding is a very serious offense that should not be, and cannot be, rewarded in any fashion. Yet that, in effect, would be the result here if I were to order Hinke's reinstatement in the face of his discredited testimony. That, I will not do.

Instead, Hinke must live with the full consequences of his own actions. He chose to gamble by not telling the truth about his March 9 conversation with Waldhart and he now must pay the price for losing that gamble.

That is why it is my

AWARD

That the District properly terminated grievant Jeffrey Hinke; his grievance is therefore denied.

Dated at Madison, Wisconsin this 12th day of November, 1998.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

AAG/gjc
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